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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 OFF-WHITE LLC,

4 Plaintiff,

5 v.

18 Civ. 2099 (LGS)

6 A445995685, et al.,

7 Conference

8 Defendants.

9 -----x

10 New York, N.Y.

March 22, 2018

12:00 p.m.

11 Before:

12 HON. LORNA G. SCHOFIELD,

13 District Judge

14 APPEARANCES

15 EPSTEIN DRANGEL LLP

16 Attorneys for Plaintiff

17 BY: MARY C. BRENNAN

JASON DRANGEL

18 MAVRONICOLAS & DEE LLP

19 Attorneys for Defendant Trendy_World

BY: PETER CARO DEE

20 DEWEY PEGNO & KRAMARSKY LLP

21 Attorneys for nonparty ContextLogic

22 BY: DAVID S. PEGNO

- and -

23 BARNES & THORNBURG LLP

24 BY: DWIGHT D. LUECK (via telephone)

25 ALSO PRESENT: DEVANG SHAH, In-house Counsel Wish.com (via
telephone)

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(In the robing room)

THE DEPUTY CLERK: Good morning. Mr. Lueck and Mr. Shah, are you there?

MR. LUECK: We are. Thank you.

THE DEPUTY CLERK: We're here before the Honorable Lorna G. Schofield, in Off-White LLC v. A445995685, et al. For the plaintiff, we have Mary Kate Brennan and Jason Drangel. For nonparty, ContextLogic, we have David S. Pegno and Dwight Lueck and Devang Shah. Mr. Lueck and Shah are on the phone. And for Trendy_World, we have Peter Dee.

We can begin. Thank you.

THE COURT: Good morning. Sorry for the delay. I noted that late yesterday there were filings by one of the restrained parties, which is ContextLogic, as well as a response to that opposition. They were filed late, so I haven't had a chance to study them, but I have looked at them.

I think maybe the best way to do is for me to start with ContextLogic. As I understand it, the scope of the preliminary injunction would bar ContextLogic from contributing on the Wish platform goods being sold by any of the defendants and not simply goods of Off-White. Is that essentially what the dispute is about?

MR. LUECK: Yes, your Honor. Dwight Lueck on behalf of ContextLogic. Thank you for allowing us to participate by phone. It's an unusual year when there are more debilitating

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1 blizzards in New York City than in Indiana.

2 THE COURT: I'll just say, as a Hoosier myself, I know
3 that from personal experience. The weather's been very odd.

4 Go ahead.

5 MR. LUECK: Yes, the issue here is focused on Section
6 1(a) (6) on page 12 of the TRO, which would restrict
7 ContextLogic and other platform providers from allowing the
8 defendant merchants to offer any products over the platform,
9 including products that in no way infringe on the Off-White
10 rights. We are not before the Court today to challenge any of
11 the other provisions. In fact, there is a provision that
12 requires total freezes of assets, including assets that may
13 have been derived from not infringing sales by the defendant
14 merchants. We are not seeking reconsideration of that point.
15 We are only seeking reconsideration of the point which would
16 allow all 161 of these merchant stores to be taken down.
17 Currently, there are approximately 200 live posts, 200 valid
18 live posts on the Wish trading platform of these merchants that
19 do not infringe on the Off-White marks.

20 THE COURT: Just so I understand that, you mean
21 they're not Off-White products; they're totally unrelated
22 products, is that what you're saying?

23 MR. LUECK: That's correct, your Honor. Everything
24 from socks to electrical devices to phone cases. It's just a
25 huge range of products.

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1 THE COURT: Under other brand names, right?

2 MR. LUECK: Yes, if any brand names at all are used.
3 Most often merchants are not offering branded products. It's
4 just a picture of some stylish socks that do not include the
5 Off-White mark and marketed as socks.

6 THE COURT: Let me interrupt you for a second. Your
7 argument has greater intuitive appeal. I understand Judge
8 Pauley didn't necessarily agree, ultimately, in a case that he
9 had, so perhaps I should hear the other side.

10 MS. BRENNAN: Thank you, your Honor. And I appreciate
11 you mentioning the case before Judge Pauley, because our
12 argument would be very similar in this matter as our reading of
13 ContextLogic's argument. The primary issue that we have here
14 is that without the complete restraint --

15 THE COURT: Let me just interrupt you for one second.
16 Was that Mr. Lueck on the phone who was talking just
17 now?

18 MR. LUECK: Yes, your Honor.

19 THE COURT: I just want to make sure you can hear.
20 Can you hear Ms. Brennan?

21 MR. LUECK: Yes.

22 THE COURT: Go ahead.

23 MS. BRENNAN: Without the complete restraint on the
24 user accounts and merchant Wish has that no mechanisms in place
25 that would prohibit a defendant from just putting up another

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1 posting and then continuing to sell products that infringe
2 Off-White's trademarks. We could just continue to go on, and
3 if that happened, there's nothing that would prevent a
4 defendant from just continuing its counterfeiting activities.

5 THE COURT: Let me just ask Mr. Lueck about that.
6 Obviously, if there were a preliminary injunction in place,
7 your client would be acting under risk of contempt of court if
8 it allowed further postings of Off-White goods, and so I would
9 think that you wouldn't want to put your client in that
10 position if they couldn't abide by the order. So tell me how
11 you would propose to do that.

12 MR. LUECK: Your Honor, the trading platform has in
13 place a system that provides the posts will be taken down
14 promptly if parties -- if the trading platform is made aware of
15 those. In addition, it has a policy in place concerning
16 suspension and termination of merchants that provides that if a
17 merchant does repost products, there will be sanctions. Those
18 sanctions are not immediately published, but if we were to find
19 that a merchant had, in fact, violated the TRO, that would
20 result in some quick action.

21 THE COURT: OK. Let me just interrupt. It wouldn't
22 just be they who had violated the TRO. I think it would also
23 be your client that had violated the TRO. So what mechanism do
24 they have in place to ensure that there isn't reposting?

25 MR. LUECK: The client does screen -- we use the

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1 phrase "screen" -- the defendant's merchant stores to determine
2 whether any product on those stores is allegedly infringing or
3 appears to have allegedly infringed.

4 THE COURT: What does that mean, "screen"? Does your
5 client have sufficient confidence in the screening that they
6 are willing to be in contempt of court if they don't notice or
7 observe that something has been reposted?

8 MR. LUECK: Yes, your Honor. At this point we
9 wouldn't concede that we would be in contempt. I think there
10 may be some questions as to that, but if we were, we would
11 certainly be prepared to take the risk of that based on the
12 current screening system that we have in place.

13 THE COURT: I'll let Ms. Brennan continue.

14 MS. BRENNAN: Your Honor, I would just draw your
15 attention to the two exhibits which we attached to our letter
16 that we submitted to the Court yesterday in response to
17 ContextLogic, Exhibit B.

18 THE COURT: Which I don't have. So just go ahead
19 and --

20 MS. BRENNAN: I have a copy I can provide.

21 THE COURT: Thank you.

22 MS. BRENNAN: I'm going in reverse order here, but
23 Exhibit C.

24 THE COURT: Thank you.

25 MS. BRENNAN: You're welcome.

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1 THE COURT: And Exhibit B?

2 MS. BRENNAN: Yes, your Honor. Exhibit B shows
3 situations as of yesterday and quite late in the afternoon.
4 These are the defendant's -- the infringing listings which are
5 identified in both Exhibit C to the complaint and Schedule A to
6 the TRO. In situations where the infringing listing by a
7 defendant is still posted actively on Wish.com, in Exhibit B
8 specifically, you can click through and purchase a product as
9 of late last night.

10 Exhibit C is a sampling of infringing listings, again,
11 which were identified in both Exhibit C to the complaint and in
12 Schedule A to the TRO. These infringing listings are still
13 available on Wish.com. However, you can see from the
14 screenshots when you go to click through it says "Sold out."
15 We believe this is just as problematic as the active listings
16 because Wish then prompts users, or customers, utilizing
17 Wish.com to go to other sellers who are most likely not
18 defendants in our action and purchase the infringing product
19 through them.

20 THE COURT: It also suggests that these goods are
21 available at these prices, which I suspect is not good for your
22 client's business model.

23 MS. BRENNAN: No. Off-White, just a bit of
24 background, is a luxury streetwear designer. It's incredibly
25 popular. Designer Virgil Abloh is written up everywhere. As

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1 submitted in our application, products are sold everywhere,
2 from Barney's to boutiques.

3 THE COURT: Let me ask Mr. Lueck about that. I'm
4 looking at Exhibit B and C, which I assume you have since --
5 actually, they're not online. Are you sure Mr. Lueck has them?

6 MS. BRENNAN: I believe so.

7 MR. LUECK: Yes, your Honor, Ms. Brennan provided us
8 with copies of those last evening. And to the extent we have
9 had an opportunity to look into those matters, as to the first
10 exhibit, Exhibit B, there are six postings that are shown
11 there. Those have all been taken down or, because of the time
12 difference between San Francisco and here, are in the process
13 of being taken down, and a rescreening of all of the defendant
14 merchants is going forward.

15 THE COURT: Wait. Just wait. But that sounds, then,
16 like the TRO was violated and doesn't give me any comfort that
17 your client would be able to screen in order to comply with a
18 preliminary injunction.

19 MR. LUECK: Your Honor, I have not had an
20 opportunity -- or the client has not had an opportunity fully
21 to go back and determine the history for each of these six
22 posts. It appears that they -- Ms. Brennan has certainly
23 represented that they're still live. So to the extent that
24 that's the case, we're taking action promptly. So we have not
25 had an opportunity to go back and determine, for example,

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1 whether the posts were taken down, but there's some lag time.

2 THE COURT: So tell me about the screening process.

3 MR. LUECK: The screening process applies examinations
4 of use of word marks such as "Off-White" and, to the degree
5 that the technology is present, also will allow for screening
6 of images, to the extent that the same images are being used in
7 a subsequent post. That screening takes place on a regular
8 basis.

9 THE COURT: Just so I understand, you have some
10 technology that will use digital screenings to screening for
11 words like the word "white" and to screen for specific images;
12 is that what you're saying?

13 MR. LUECK: Yes. In this instance, just screening for
14 the word "white" would create a lot of false positives, but
15 "Off-White" is being screened for. And, yes, to the extent
16 that that phrase is found to be used, those posts are tagged
17 and examined promptly by screeners and taken down if they're an
18 Off-White product.

19 THE COURT: I just note there's no hyphen in Off-White
20 in these posts. Are they also screening for "off white"
21 without a hyphen?

22 MR. LUECK: I cannot immediately speak to that, your
23 Honor, and that is a possible reason for how these posts made
24 it through without being captured.

25 THE COURT: Well, then it sounds like they could also

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1 perhaps have "off" with two spaces and "white" and it wouldn't
2 be picked up by your screening.

3 MR. LUECK: I can't speak to that particular issue. I
4 believe there is the ability to screen with a space between. I
5 cannot speak to whether that was exercised in this specific
6 incident without getting facts from people.

7 THE COURT: Tell me again about the extent of the
8 legitimate, so-called legitimate, postings by the defendants in
9 this case on Wish.

10 MR. LUECK: Certainly. There are 161 named
11 defendants. In the time that they have engaged in transactions
12 on the Wish trading platform, they have offered a total of
13 \$41 million in product. Over \$38 million of product is not
14 product that in any way is being disputed by Off-White as
15 allegedly infringing on their trademarks. That product, as I
16 indicated earlier, is a wide variety of product, including
17 electrical devices, wearing apparel that in no way has these
18 trademarks, as well as other products. There are currently
19 200 -- there were at the time the person looked at it, created
20 a number of couple days ago, 200,000 posts from the remaining
21 merchants.

22 THE COURT: But let me ask Ms. Brennan a question.
23 Does Off-White sell only clothing?

24 MS. BRENNAN: They do not. I mean, it is a luxury
25 brand, and you will see from the Exhibit C that it's everything

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1 from socks to hats and beyond, but there are things like phone
2 cases, a pill case. It's a very comprehensive brand. It's not
3 just sweatshirts and T-shirts.

4 THE COURT: What I hear Mr. Lueck saying is that the
5 breadth of the order would affect them in a negative way
6 because of the extent of the postings by the defendants. Do
7 you want to address that?

8 MS. BRENNAN: I would, your Honor, and I'd also like
9 to provide you with a copy of the most recent discovery that we
10 received on March 20 from Wish, and I think that this is
11 important. I'll take a step back and say, one, there's a lot
12 of conflicting evidence that we've received from Wish. This is
13 the second set of information. We received the first similar
14 data sheet on March 13, 2018 -- and I apologize, I do not have
15 a copy of that today -- which shows the first set of data that
16 we received on March 13, 2018. Appears to only cover one
17 infringing listing for each and every defendant, whereas --

18 THE COURT: I don't even understand what the document
19 is. So just explain it.

20 MS. BRENNAN: I will do my best, because it's not
21 ours.

22 THE COURT: Not your document, I understand.

23 MS. BRENNAN: And we've also had a hard time figuring
24 it out. But I'll draw your attention to where it says
25 "Merchant ID number." That would correspond with the

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1 defendant. Unfortunately, the way the information is provided
2 to us by Wish, we have to go back and put it together, but I
3 don't have that done yet.

4 THE COURT: OK.

5 MS. BRENNAN: But then the infringing product ID,
6 which is the first column, it is our understanding that that is
7 an identification of an infringing product that bears one of
8 the Off-White trademarks. A major issue that we just --

9 THE COURT: What's each separate line?

10 MS. BRENNAN: We believe each line is an individual
11 infringing product listing.

12 THE COURT: So these are all separate products, not
13 just sales of the same products?

14 MS. BRENNAN: That's what we believe. I guess --

15 THE COURT: Mr. Lueck, can you help us at all?

16 MR. LUECK: Each of the separate product listings, it
17 is possible that it is the same product being listed over time
18 more than once. Without getting into the product listings
19 themselves, it's difficult to know that, but each is a separate
20 product listing. We call it CIT.

21 THE COURT: OK. Go ahead.

22 MS. BRENNAN: Our concern is the information provided
23 by Wish to date is supposed to cover all of the infringing
24 listings. Our evidence shows that in certain cases that has
25 just not happened yet. This evidence that we received most

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1 recently, there are 14 defendants for which on this spreadsheet
2 we've received no information for at all. In addition, there
3 are four defendants which we did receive information from Wish,
4 but that Wish will say there's only one infringing listing;
5 whereas, the evidence, which is Exhibit C to the complaint,
6 clearly shows that that defendant had at least two additional
7 infringing listings. So we're dealing with information that we
8 don't believe to be completely correct at this time.

9 And our concern, to go back to why we believe it's
10 truly inappropriate for anything short of a complete merchant
11 storefront restraint, is because we don't know, there's some
12 instances where our data shows, the evidence in the
13 screenshots, Exhibit C to the complaint, it's clear there are
14 multiple listings. Here, it's clear there are multiple
15 listings, and we just don't think we have even come close to
16 knowing truly how many listings and product sales for the
17 infringing products that have been offered. We're nowhere
18 close to knowing that at this point, but I think --

19 THE COURT: What about the impact argument that
20 Mr. Lueck has alluded to?

21 MS. BRENNAN: I understand that's something that, I
22 think, Judge Pauley in the prior case covered quite clearly
23 that, comparatively, 161 storefronts -- and I do want to note
24 that of 161 defendants, we have only one defendant here today
25 to object to anything at all. So percentage-wise on that point

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1 is very, very small.

2 But to get to your question about the impact, 161
3 storefronts compared to the hundreds of thousands to millions
4 of storefronts that are available on Wish, it's a very, very
5 minor percentage. And we don't believe that that should cause
6 any undue burden on Wish.

7 THE COURT: Do we know what the percentage is,
8 Mr. Lueck?

9 MR. LUECK: I'm sorry. The percentage of what, your
10 Honor?

11 THE COURT: The defendants at issue here who post on
12 Wish versus the universe of vendors on Wish.

13 MR. LUECK: I do not have that number before me. I
14 know that there's been \$43 million -- \$42 million of
15 transactions in total over time.

16 THE COURT: But I don't know how long that is or
17 42 million out of what? If it's 42 million out of 43-, that's
18 one thing, but if it's 42 million out of hundreds of millions,
19 then it's something else.

20 MR. LUECK: Well, your Honor, I think we're looking at
21 a false comparison here. I know Judge Pauley did this in his
22 analysis. Wish is not the defendant here. Wish is the trading
23 platform, and what we are looking at is an injunction that
24 would potentially shut down 161 merchant stores. The impact on
25 those stores is 100 percent over time of the noninfringing

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1 products that have been offered over 1 million U.S. users that
2 have purchased those products, and one point --

3 THE COURT: Wait, wait. But you only have standing to
4 talk about your client, and your client is ContextLogic. And
5 it operates the Wish platform, is that right?

6 MR. LUECK: We come as the party Wish, which is an
7 impacted party, although, ultimately, Ms. Brennan and
8 plaintiffs still bear the burden of establishing that the
9 preliminary injunction is appropriate and that the scope is not
10 a scope that will harm defendants, impacted parties, or the
11 public.

12 THE COURT: OK. Ms. Brennan, do you want to state
13 your best case for why you've met your burden of proof.

14 MS. BRENNAN: I mean, I think, your Honor, our
15 comprehensive pleadings and our application, which originally
16 we already asked for the TRO, would be why we'd ask that to be
17 converted into a preliminary injunction order because of the
18 irreparable harm to our client that is caused by the constant
19 and pervasive postings of products that infringe my client
20 Off-White's trademarks.

21 THE COURT: Can you address the scope issue of the
22 particular paragraph we're talking about.

23 MS. BRENNAN: Sure, which is -- let me just pull up
24 the paragraph itself, page 12 of the TRO.

25 THE COURT: And it's paragraph 1(a) (6).

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1 MS. BRENNAN: Which states, "within five days after
2 receiving actual notice of this order, providing service to the
3 defendants, defendants user accounts, and defendants merchant
4 storefronts, including without limitation, continued operation
5 of defendants' user accounts and merchant storefronts." In
6 effect, what we're asking for is the complete restraint on the
7 merchant storefronts and user accounts.

8 I think that the evidence is very clear that Wish has
9 no mechanism whatsoever -- I understand and I hear Mr. Lueck's
10 comments about how they might do a screen, but it's clearly
11 been ineffective. We were told and there were representations
12 to both us individually and to the Court that every single
13 infringing listing of these 161 defendants was removed as of
14 Monday, but as of yesterday, I could go on and buy a
15 counterfeit Off-White product from a variety of defendants, and
16 I think that's a major problem.

17 THE COURT: Based on what I've heard from the
18 plaintiff and from ContextLogic, I am rejecting the objection
19 of ContextLogic. It seems to me that the plaintiffs have met
20 their burden with respect to the factors that warrant a
21 preliminary injunction, but particularly with respect to the
22 scope of paragraph 1(a)(6), because of very concrete evidence
23 that's just been put before me that this so-called screening by
24 ContextLogic is not effective. And, in fact, ContextLogic, on
25 its Wish platform, has been in violation of the temporary

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1 restraining order in continuing to post infringing Off-White
2 products.

3 So, for all those reasons, I will enter an order today
4 granting the preliminary injunction. I would note that there
5 were no other objections by defendants and no other appearances
6 by defendants.

7 MR. DEE: Might I say something?

8 THE COURT: Yes.

9 MR. DEE: I do represent one of the individual
10 defendants, Trendy_World.

11 THE COURT: Did we know that?

12 MR. DEE: Yes, I filed something by email last night.
13 We were not able to file it online on ECF.

14 THE COURT: OK.

15 MR. DEE: That is a spreadsheet there that I filed.
16 It's Exhibit A to this declaration. I'm not sure if you have a
17 copy.

18 MR. DRANGEL: It literally came in at midnight.

19 MS. BRENNAN: Exactly midnight.

20 MR. DEE: I would say 11:59.

21 THE COURT: OK. In any event.

22 MR. DEE: Just speaking on behalf of my client only.

23 THE COURT: What is your client?

24 MR. DEE: Trendy_World is one of the merchants on the
25 Wish.com platform.

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1 THE COURT: OK.

2 MR. DEE: To speak to the overall argument regarding
3 the fact that some new postings have been made, first of all,
4 Trendy World has taken down the one sole product that is
5 alleged to be infringing here, grip socks. Perhaps they sell
6 it for \$80 normally. My client had only made, and it's set
7 forth in the declaration \$600, just over \$600, total on the
8 sales of, I think, about 300 orders. Their total revenue
9 overall during the same time period of those sales was, as set
10 forth in paragraph 5, \$527,000. So the sales of the allegedly
11 infringing socks represent .13 percent of the total revenue
12 during the same time period.

13 The socks have been taken down. A preliminary
14 injunction preventing the account to go forward would be
15 irreparable Harm on my client's business. So, at the very
16 least, we would seek a carve-out of that particular defendant.
17 I think it -- I'm the only attorney here representing one of
18 the defendants. They're here to -- they're appearing, they're
19 here to defend their rights. Certainly, I think, preventing
20 any of these users, and certainly the defendant that I
21 represent, from operating on the website would go beyond what I
22 think is a narrowly tailored solution to what the plaintiffs --

23 THE COURT: I'm going to interrupt, and let me hear
24 from Ms. Brennan.

25 MS. BRENNAN: Sure. I think the most important thing

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1 to point out is -- and we did receive this information very,
2 very late last night -- but based on the data which Wish
3 provided to you, which you have a copy of, as of March 20,
4 2018, it shows that the product lifetime or total units sold of
5 this one particular infringing Off-White product was 2,153.
6 So, obviously, there's a major discrepancy with what this
7 defendant has put forth. And the total product lifetime value
8 we have at \$5,305.70.

9 I do want to note that based -- and this is a major
10 discrepancy we have with Wish in general, which I discussed
11 earlier in terms of the evidence, is that we received a prior
12 spreadsheet on March 13, 2018, which showed that the merchant
13 balances are varied. So back on March 13, 2018, the current
14 merchant value for defendant Trendy_World was \$128,010.12.

15 THE COURT: I'm just going to interrupt.

16 MS. BRENNAN: Sure.

17 THE COURT: You really haven't had a chance to respond
18 to this. What I will do is the TRO is in place until today.

19 MS. BRENNAN: Today.

20 THE COURT: I think what I should do, the TRO is in
21 place, I am going to enter the restraining order, but I will
22 give both sides leave to put in an additional letter by, let's
23 say, next Wednesday. And try to talk to each other just to
24 figure out what the numbers are, because it doesn't help me
25 very much to have a very small number from here and a very

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1 large number here, and I have no idea what is right, and
2 then if you can, try to work something out. But if you can't,
3 in any event, send me a letter on Wednesday, tell me where you
4 stand. You can do that by filing it on ECF, and I will
5 consider that as an application by your client Trendy --

6 MR. DEE: Trendy_World.

7 THE COURT: -- Trendy_World to carve it out of the
8 preliminary injunction, and I will consider it based the
9 letters.

10 MR. DEE: Thank you.

11 MS. BRENNAN: Thank you, your Honor.

12 THE COURT: All right. Thank you.

13 MS. BRENNAN: Just one, I noticed that you mentioned
14 that we would be able to file next Wednesday on ECF. Do we
15 need -- from our end, would you like us to do anything about
16 unsealing the case at this time, because we do believe it would
17 be appropriate to be unsealed now?

18 THE COURT: You should unseal it at this point. Do
19 you need an unsealing order from me?

20 MS. BRENNAN: I can prepare one for you and submit it
21 to you.

22 THE COURT: I also need a form of order for the
23 preliminary injunction to be sent to me in Word, and you should
24 file it on the docket so everybody who's involved can see it.

25 MS. BRENNAN: OK. I will submit that to you when I

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1 return to the office, and as soon as the case is unsealed, I'll
2 be able to ECF that.

3 THE COURT: Great. Thank you.

4 MS. BRENNAN: Thank you, your Honor.

5 (Adjourned)